

**Before the
Federal Communications Commission
Washington D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 05-162
Table of Allotments,)	RM-11227
FM Broadcast Stations.)	RM-11284
(Enfield, New Hampshire; Hartford and White River)	
Junction, Vermont; and Keeseville and Morrisonville,)	
New York))	

**MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**

Adopted: January 25, 2011

Released: January 26, 2011

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by Hall Communications, Inc. (“Hall”) directed to the *Report and Order* in this proceeding.¹ Nassau Broadcasting III, L.L.C. (“Nassau”) filed an Opposition to the Application for Review and Hall filed a Reply. Radio Broadcasting Services, Inc. (“RBS”) filed Comments in Support of the Application for Review and a Reply to Nassau’s Opposition. For the reasons stated below, we grant Hall’s Application for Review to the extent of rescinding the staff action reallocating Channel 231A to Morrisonville, New York, and reinstating the allotment of Channel 231A at Keeseville, New York. In all other respects, we affirm the *Report and Order*. Finally, we modify the FM allotment processing policies so that, on a going forward basis, we will no longer accept proposals involving the reallocation, class down-grade or deletion of a vacant FM allotment.

II. BACKGROUND

2. The relevant actions in this case begin in 2004 when the staff allotted Channel 231A to Keeseville, as a first local service.² In doing so, it denied a competing proposal filed by the former licensees of Station WWOD(FM), Channel 282C3, Hartford, Vermont, and Station WXLFFM) (formerly WSSH(FM)), Channel 237A, White River Junction, Vermont. That competing proposal, *inter alia*, would have reallocated Channel 282C3 from Hartford to Keeseville, and modified the Station WWOD(FM) license to specify Keeseville as the community of license. The staff action in *Keeseville I* is final and the Channel 231A allotment at Keeseville has not yet been subject to auction.

3. In this proceeding under review, Nassau, the current licensee of Stations WWOD(FM) and WXLFFM), filed a Petition for Rule Making requesting that the Commission allot Channel 282A to Enfield, as that community’s first local aural transmission service. To accommodate the operation of Channel 282A at Enfield, Nassau proposed to reallocate Channel 282C3 from Hartford to Keeseville, and to modify the Station WWOD(FM)’s license accordingly. Further, to replace the loss of the sole local service to Hartford, Nassau requested that Channel 237A, Station WXLFFM), be reallocated from White River Junction to Hartford, and Station WXLFFM)’s license be modified to specify Hartford as the community of license. Nassau also requested that Channel 231A be reallocated from Keeseville to

¹ *Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York*, Report and Order, 21 FCC Rcd 5136 (MB 2006) (“*Enfield Report and Order*”).

² *Keeseville, New York, Hartford and White River Junction, Vermont*, Report and Order, 19 FCC Rcd 16106 (MM Docket No. 02-23) (MB 2004) (“*Keeseville I*”).

Morrisonville at a new transmitter site, thus providing Morrisonville with its first local service. Hall filed a counterproposal proposing that the Commission retain the current channel allotments at Hartford, White River Junction, and Keeseville, but allot Channel 282C3 to Morrisonville³ as a new “drop-in” allotment that would provide a first local service at that community. The *Enfield Report and Order* granted Nassau’s Petition for Rule Making and denied Hall’s Counterproposal. Hall seeks review of the *Report and Order*.

III. DISCUSSION

A. Application for Review

4. In its Application for Review, Hall argues that Nassau’s Petition for Rule Making was an attempt to overturn the *Report and Order* in *Keeseville I*. Hall also claims that the *Enfield Report and Order*’s action in reallocating Channel 231A from Keeseville to Morrisonville is contrary to the Commission’s policy of not removing a vacant TV or FM allotment from a community if an applicant or potential applicant has expressed an interest in applying for a construction permit.⁴ Hall states that, in *Keeseville I*, it expressed an interest in filing an application for Channel 231A at Keeseville, if that channel were allotted to Keeseville, and that it continued to express that intention in this proceeding.⁵

5. We grant Hall’s Application for Review to the extent of rescinding the reallocation of Channel 231A from Keeseville to Morrisonville. In doing so, we recognize the public interest benefit of a first local service at Morrisonville. However, we agree with Hall that the *Enfield Report and Order* is inconsistent with existing Commission case law, which states that the Commission will not remove a vacant FM or TV allotment from a community if a potential applicant has expressed an interest in applying to build a station on that channel, absent a compelling reason to do so.⁶ This policy reflects our view that one critical aspect of implementing Section 307(b) of the Communications Act⁷ is to provide an efficient means to allot channels in a manner that affords prospective applicants reasonable certainty and administrative finality.⁸ Thus, we reinstate Channel 231A at Keeseville at the coordinates specified in *Keeseville I* because Hall has expressed a continuing interest in applying for Channel 231A at Keeseville, Nassau has not raised a compelling reason to change the allotment from Keeseville to Morrisonville, and the Channel 231A allotment has not yet been subject to the auction process. The Channel 231A Keeseville and Morrisonville allotments are in technical conflict. No other channel is available in Morrisonville. Therefore, we delete the Channel 231A Morrisonville allotment.

6. In its Reply to Opposition to Application for Review, Hall argues that if the Commission concludes that it was error to reallocate Channel 231A from Keeseville to Morrisonville, it must also reject

³ The proposal to allot Channel 282C3 to Morrisonville is mutually exclusive with Nassau’s proposal to reallocate Channel 282C3 from Hartford, Vermont, to Keeseville, New York.

⁴ In support of this proposition, Hall cites *Montrose and Scranton, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 6305 (1990) (“*Montrose and Scranton, PA MO&O*”); *Driscoll, Texas, et al.*, Report and Order, 10 FCC Rcd 6528 (MMB 1995); and *Martin, Tennessee, et al.*, Memorandum Opinion and Order, 15 FCC Rcd 12747 (MMB 2000).

⁵ See, e.g., *Hall Comments* at 2 (filed Apr. 1, 2002) (MM Docket 02-23); *Hall Comments and Counterproposal* at 2, 3 (filed July 6, 2005) (MB Docket 05-62).

⁶ See, e.g., *Montrose and Scranton, PA MO&O*, 5 FCC Rcd at 6306.

⁷ 47 U.S.C. § 307(b).

⁸ See *Montrose and Scranton, PA MO&O*, 5 FCC Rcd at 6306.

the other allotment proposals set forth in Nassau's petition for rulemaking. We disagree. The *Enfield Report and Order* correctly found that the Township of Enfield is a community to which an FM allotment may be made. Nassau's proposal to add Channel 282A at Enfield is preferred over Hall's counterproposal to add Channel 282C3 to Morrisonville. Each proposal would provide a first local service to its respective community under priority (3) of the FM allotment priorities.⁹ The population of Enfield (2000 U.S. Census population of 4,618) is greater than the population of Morrisonville (2000 U.S. Census population of 1,702) and, thus, Nassau's proposal is preferred.¹⁰ We also affirm the *Enfield Report and Order*'s reallocation of Channel 282C3 from Hartford to Keeseville as a second local service, and the reallocation of Channel 237A from White River Junction to Hartford, in order to accommodate the allotment of Channel 282A to Enfield. In addition, we affirm the provisions in the *Report and Order* that condition the commencement of service on Channel 282C3 by Station WWOD(FM) at Keeseville, on the commencement of service on Channel 237A by Station WXLN(FM) at Hartford, (File No. BPH-20070105ADO), to avoid the loss of a sole local service to Hartford.

7. Consistent with the Commission's technical requirements, Channel 231A can be allotted to Keeseville, New York, utilizing coordinates of 44-31-45 NL and 73-32-00 WL, with a site restriction of 5.0 kilometers (3.1 miles) northwest of Keeseville. The Canadian Government has concurred with this specially negotiated short-spaced allotment.

B. FM Allotment Processing Policy

8. We take this opportunity, prompted by the circumstances that gave rise to the Application for Review, to adjust our processing policy to more accurately reflect the current demand for FM spectrum and the distribution of licenses through competitive bidding at auction. We conclude, for the reasons set forth below, that the public interest is better served by discontinuing the practice of considering individual requests for the reallocation, class down-grade or deletion of a vacant allotment outside of the competitive bidding process. Thus, with the exception of same-class channel substitutions,¹¹ vacant FM allotments will be awarded pursuant to competitive bidding procedures.

9. The current processing policy developed through a series of adjudicatory decisions beginning more than 35 years ago, at a time when demand for FM spectrum was dramatically less than today and as part of a radically different regime for licensing new radio broadcast stations. In 1974, the Commission declined to reallocate a vacant allotment from Nebraska City, Nebraska, to Red Oak, Iowa, on the mere representation that a heretofore unknown but "interested" party had "taken steps *looking toward* the preparation and filing of a Nebraska City application" under the then-in effect "first-come, first-served" filing rules.¹² It cautioned, however, that it would consider a renewed petition to move the channel if there was "undue delay in activating the channel."¹³ In 1981, the facts of *Martin and Salyersville, Kentucky*¹⁴ similarly reflect a relaxed licensing scheme for awarding spectrum for which

⁹ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982), *recon. denied*, Memorandum Opinion and Order, 56 RR 2d 448 (1983). The FM allotment priorities are: (1) first full-time aural service; (2) second full-time service; (3) first local transmission service and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

¹⁰ See *Blanchard, Louisiana, and Stephens, Arkansas*, Memorandum Opinion and Order, 10 FCC Rcd 9828 (1995).

¹¹ See *infra* ¶ 10.

¹² *Red Oak, Iowa*, Report and Order, 46 FCC 2d 344, 345 (1974) (emphasis added).

¹³ *Id.*

¹⁴ Report and Order, 50 RR 2d 501 (1981).

there was limited demand. In that case, the staff entertained the proposed reallocation of an FM channel from Martin to Salyersville, noting that no application had been filed since its assignment to Martin three years previously.¹⁵ The staff, again, declined to reallocate the channel based on an expression of interest but noted that it would consider another request “after a reasonable time.”¹⁶ The Commission subsequently provided the following rationale for not reallocating a channel in which interest has been expressed:

The policy reflects the Commission’s view that one critical aspect of implementing the mandate of Section 307(b) of the Communications Act is to provide an efficient allotment system that affords prospective applicants reasonable certainty and administrative finality in seeking to initiate service. In short, the ‘fair distribution’ of service analysis which underlay the original allotment decision should not be disturbed where an active interest in providing service exists.¹⁷

10. Today, it is beyond dispute that there is “active interest” in the entire inventory of vacant FM allotments that will be awarded pursuant to competitive bidding procedures. The Media Bureau and Wireless Telecommunications Bureau (the “Bureaus”) have completed six auctions which included FM allotments and have successfully issued hundreds of FM construction permits pursuant to these competitive bidding procedures. Several years ago, the Bureaus modified the auction procedures to improve the efficiency of the auction process and to help ensure the prompt initiation of new service.¹⁸ Moreover, the Bureaus anticipate auctioning substantially all remaining vacant allotments through a series of annual auction events during the next several years. In these circumstances, permitting vacant allotment modifications and deletions is disruptive to the orderly auctioning of this spectrum, wastes limited staff resources, and undermines the finality of the actions adopting the initial allotments. Accordingly, we discontinue the practice of accepting such proposals in the context of our FM allotment rulemaking procedures. To the extent that parties wish to pursue competing proposals, they should be timely submitted as counterproposals in the initial allotment proceeding. We will, however, permit parties to propose same-class channel substitutions for vacant allotments in order to accommodate proposals in technically related FM allotment and/or application filings. Such an allotment modification merely substitutes one frequency for another at the same community that the Commission previously determined was deserving of a new radio service. Same-class channel substitutions, therefore, do not disturb final Section 307(b) determinations on which the allotments were based.

11. The Commission will send a copy of this *Memorandum Opinion and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

IV. ORDERING CLAUSES

12. Accordingly, pursuant to the authority contained in 47 U.S.C. Sections 4(i), 303(g) and (r) and 307(b), 47 U.S.C. §§ 154(i), 303(g), (r), 307(b), IT IS ORDERED, that effective March 30, 2011, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED for the communities listed below, as follows:

¹⁵ *Id.*

¹⁶ *Id.* at 504.

¹⁷ *Montrose and Scranton, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 6305, 6306 (1990).

¹⁸ *Auction of FM Broadcast Construction Permits Scheduled for January 10, 2007*, Public Notice, 21 FCC Rcd 11144, 11178-80 (WTB/MB 2006) (eliminating the opportunity to withdraw bids after the close of a bidding round).

<u>Community</u>	<u>Channel Number</u>
Keeseville, New York	231A
Morrisonville, New York	-----

13. IT IS FURTHER ORDERED that the Application for Review filed by Hall Communications, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

14. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary